Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHAEL D. BRANDT, REBECCA L. DARUGAR, and ALDO S. K. VAN ENCK, on behalf of themselves and all others similarly situated,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of the Court's decision in *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (June 25, 2007), the Seventh Circuit erred in applying the standard in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) for school-sponsored speech to petitioner students' personal non-disruptive speech protesting the manner in which a school election had been administered.

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners: Michael D. Brandt, Rebecca L. Darugar, and Aldo S. K. Van Enck, on behalf of themselves and all others similarly situated. These parties are no longer minors, so they are not appearing by their parents.

Defendants-Appellees and Respondents: Board of Education of the City of Chicago, Chris N. Kotis, Janice M. Rosales, Christine Laughlin, and Mary Clancy.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael D. Brandt, Rebecca L. Darugar, and Aldo S. K. Van Enck, on behalf of themselves and all others similarly situated, respectfully request that the United States Supreme Court grant a writ of certiorari, summarily vacate the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, and remand the case to said Court of Appeals for reconsideration in light of this Court's decision in *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (June 25, 2007). *See, e.g.*, *Board of Trustees of the Univ. of Illinois v. Doe*, 119 S. Ct. 2016 (1999).

OPINIONS BELOW

The Order of the Court of Appeals for the Seventh Circuit, dated April 2, 2007, denying rehearing and rehearing *en banc* is reprinted in the appendix herein as App. 1a.

The Opinion of the United States Court of Appeals for the Seventh Circuit, dated February 20, 2007, is officially reported as *Brandt v. Board of Education of the City of Chicago*, 480 F.3d 460 (7th Cir. 2007), and is reprinted in the appendix herein at App. 2a - 15a.

The Memorandum Opinion and Order of the United States District Court, dated May 8, 2006, regarding costs is not officially reported and is reprinted in the appendix herein at App. 16a - 21a.

The Memorandum Opinion and Order of the United States District Court, dated March 13, 2006, regarding summary judgment is officially reported as *Brandt v. Board of Education of the City of Chicago*, 420 F. Supp. 2d 921

(N.D.Ill., 2006), and is reprinted in the appendix herein at App. 22a - 53a.

JURISDICTION

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343. Jurisdiction in the Court of Appeals for the Seventh Circuit was based upon 28 U.S.C. § 1291. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254.

The Court of Appeals affirmed the District Court's decision on February 20, 2007. Rehearing and rehearing *en banc* by the Court of Appeals was denied on April 2, 2007. On June 22, 2007, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to August 30, 2007.

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the spring of 2003, petitioners were 14-year-old eighth graders in the gifted program at Beaubien School, a Chicago public elementary school that houses approximately 1000 students. The eighth grade class at Beaubien in 2003 consisted of 72 regular program students and 27 gifted program students, 24 of whom opted to participate in this class action lawsuit. *R200-16, p63; CA7 App. B-4, #1.*[1] The school has no history of violence or gang activity and is recognized as one of the safest schools in the entire Chicago Public School system. *R167-8, p21; R200-16, p63; CA7 App. B-3, #17; CA7 App. B-6, #5.*

In February 2003, the annual election for an eighth grade class shirt was held at Beaubien School. Approximately 30 entries for the contest were hung in a hallway for consideration. One of the entries was drawn and submitted by petitioner Michael D. Brandt. Brandt said that his drawing was intended to be a silly, goofy-looking cartoon kid, making light fun of the fact that supposedly bright eighth graders were moving on to higher education. *R200-1, pp109, 115; CA7 App. B-3, #3.*

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[1] In this Petition, "R" refers to the docket documents in the District Court. "CA7 App" refers to the Appendix originally filed with the Court of Appeals.

Prior to the voting, the gifted class had agreed that they all liked Brandt's design, and there was a consensus that they would all vote for his entry. The gifted students reasoned that, if they all voted for Brandt's design and the regular students' 72 votes were split among all 30 entries, there was a high probability that Brandt's design would win. The students' understanding was that the shirt with the most votes would win. *R200-1, pp114-115; CA7 App. B-3, #1.*

After the voting was completed, the teacher conducting the election told the gifted class that the results of the election were "too close to tell" and that there would have to be a re-vote between the top three shirts, one being Brandt's design. The gifted class was immediately suspicious that the election process had been subverted, because counting votes and determining which shirt had won should not be particularly difficult. Furthermore, the teacher refused to disclose the actual vote count. After the re-vote, a design other than Brandt's was declared the winner. Once again, the vote count was not disclosed. *R200-1, p112-115; CA7 App. B-3, #2.*

Within a week of the disputed election, respondent Chris N. Kotis, the principal, got wind of the fact that the gifted class was talking about protesting the outcome of the election by making and wearing a shirt with Brandt's design on it. Kotis told Assistant Principal Mary Clancy, also a respondent, to investigate the situation; she reported back that the gifted students believed that there had been election improprieties and that their shirt had won. *R200-16, pp44-45, 48-49; CA7 App. B-3, #9.* Shortly thereafter, Clancy and Kotis told the gifted students that making or wearing a shirt with Brandt's design would be disrespectful of the principal's authority and would result in student suspensions because it was not the official shirt. *R200-1, pp118-120, 124, 136, 140.*

The eighth grade gifted students decided that they would go ahead and make a shirt with Brandt's design as a protest of the election process. During March 2003, the students collected the money among themselves to pay for production of the shirt. Every one of the 27 students in the eighth grade gifted class purchased a shirt with Brandt's design. *R200-1, pp123, 136.* However, because of the principal's threats of suspension, the students decided to wait two weeks, until April 1, 2003, to wear the shirt for the first time. That date was picked because it was a schoolwide standardized testing date. The gifted students' reasoning was that school administrators would not be inclined to suspend them on a day when the administration would benefit from their normally high test scores. *R200-1, p136; CA7 App. B-3, #6.*

The main difference between Brandt's design for the eighth grade contest and the design of the shirt actually produced for the April 1, 2003, protest was the addition of "Gifties 2003" to the back of the shirt. The decision to add the word "gifties" was not made until immediately before the shirts were actually produced. The purpose was to adopt and embrace the nickname that the entire school had long used for gifted students and to identify the gifted class as the one that had been cheated in the election. *R200-1, pp135, 219-220; CA7 App. B-3, #5.*

On April 1, 2003, 19 of the 27 members of the eighth grade gifted class wore the shirt with Brandt's design to school. *R200-1, pp140-141.* Upon learning of the situation, Principal Kotis told the class that they were in violation of the Chicago Public School's Uniform Discipline Code Rule 2-5, for "failing to abide by school rules and regulations" and for "disobeying authority." *R200-1, p143; CA7 App. B-4, #15; CA7 App. B-10; CA7 App. B-11.*

As part of the disciplinary process on April 1, 2003, the assistant principal made conference calls to each of the gifted students' parents, advising them of their child's misconduct and further advising them that additional violations of the Uniform Discipline Code would result in an out-of-school suspension of five - seven days. *CA7 App. B-4, #17-19; R200-3, p7.* Between April 1 and May 12, 2003, the students refrained from wearing the shirt at issue out of fear of the threatened suspension. On May 12, 2003, 13 of the gifted students wore the shirt at issue to school for the second time. Michael Brandt's mother had been assured by an attorney for the Board of Education that the students would not be suspended or punished by being confined to their homeroom if they wore the shirt. Nevertheless, on that date, all of the gifted students were again confined to their homeroom for the entire day by respondents. *R166, #99 Response; R200-1, pp150-152; R200-16, p135.*

Between May 12, and May 22, 2003, one or more students from the gifted class wore the shirt at issue each day. On each of those days, the entire gifted class was confined to its homeroom for the entire day and there were additional penalties as well. Each day the students were confined to their homeroom, the entire class was deprived of regularly scheduled physical education classes, science labs and computer labs, and prohibited from participating in any after-school programs. *CA7 App. B-3, ##11, 12.* The gifted students were required to eat their lunches in their homeroom instead of the cafeteria with the rest of the school. *CA7 App. B-3, #12.* In addition, students were required to cover the shirts, turn them inside out, or take them off to go to the washroom. *R200-1, pp206-207; R200-16, p99.* Disciplinary charges unrelated to the t-shirt controversy were brought in retaliation against some of the students and petitioner Brandt faced a disciplinary hearing that resulted in a two-day

suspension. *R200-1, p96; R200-16, pp136, 147-149, 157-158; R200-17, p29.*

At the District Court level, petitioners spent a considerable amount of time and resources defusing respondent Kotis' false allegations that he had repeatedly confined the gifted students for entire school days because he was concerned for the safety of the gifted students at the hands of the regular students. Petitioners' position has always been that the principal's fabrication of a safety issue out of whole cloth for the purpose of allowing him to punish students he believed were defying his authority was itself evidence of the principal's knowing violation of the law, such that he should not be entitled to qualified immunity.

Despite his claims of a serious ongoing safety situation at the school, the principal had never notified or involved the counselors, social workers or psychologist, who had offices in the school. *CA7 App. B-3, #15.* The school psychologist testified that he was aware of no issues between the gifted and regular programs at Beaubien. *CA7 App. B-3, #19.* The principal admitted he had never held any school assemblies to address any of the claimed problems with the students themselves (*CA7 App. B-3, #28*) and that he had made no effort to identify any particular students that might be prone to violence. *R200-18, p13.* The Department of Safety and Security, which had an officer at the school, had not been put on notice of any issue of student safety. *R167-8, pp11, 21, 26.* Finally, no student safety issues had ever been brought to the attention of the parents or the Local School Council, which met monthly and was attended by many parents. *Appendix B-3, ##16, 28, 29; Appendix B-6, ##8-10, 17.*

Based on the principal's allegations of a serious safety situation, his supervisor, respondent Janice M. Rosales,

decided to call in the Crisis Intervention Team. *R200-19, p89.* The team had been to Beaubien twice before when there had been deaths at the school. *R200-17, p7.* The team came to the school on May 21, 2003, and within ten minutes of talking to each class determined that there was absolutely no safety problem at Beaubien. *R167-10, pp58, 74; CA7 App. B-3, #18; CA7 App. B-9.* The Crisis Team confirmed what the parents and students had been saying all along, and, after their visit, the students were allowed to wear their shirts without restriction or incident. *CA7 App. B-5, ##14, 15.*

This case was filed in the United States District Court for the Northern District of Illinois on February 5, 2004, alleging violation of the students' First Amendment right to freedom of speech, requesting declaratory relief, injunctive relief, and damages. The case was subsequently certified as a class action. On March 13, 2006, the District Court granted all defendants' motions for summary judgment on qualified immunity grounds, after finding that there was sufficient proof of a First Amendment violation. On May 8, 2006, costs were taxed against the plaintiffs in the amount of $10,556.20.

An appeal was filed in the United States Court of Appeals for the Seventh Circuit of both the summary judgment and the judgment of costs. The judgments of the District Court were affirmed on February 20, 2007, on the ground that there was no First Amendment violation, but also with a finding that there was no substantiation in the record of any safety issue. Petitioners' motion for rehearing and rehearing *en banc* was subsequently denied.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO CORRECT THE CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE AND THE DECISION OF THIS COURT IN *MORSE V. FREDERICK*, ___ U.S. ___, 127 S. Ct. 2618 (JUNE 25, 2007).

This is a student speech case. The medium of communication was the display of a student-designed and student-made t-shirt protesting the school administrators' manipulation of a school election process. App. 4a. The message was intended to comment on a political (small "p") and social issue important to the eighth grade petitioners. The message was directed at school administrators and fellow students, an audience that the District Court found would understand the communication. App. 36a - 37a. The shirt did not contain any profane or inappropriate language or images. The shirt did not cause any disruption of the school environment, nor was there any reasonable fear of a disruption. App. 3a, 13a. Despite the innocuous nature of the message, the student protestors were severely punished over an extended period by confinement, deprivation of regular instruction and school activities, and suspensions.

This Court, in *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (June 25, 2007), recently reaffirmed the viability of the long-standing *Tinker* doctrine that school speech may not be suppressed unless there is reasonable evidence that the speech will "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 509 (1969). The facts of this case, as summarized above, demand a *Tinker* application. The Seventh Circuit erroneously used a *Kuhlmeier* analysis

for school-sponsored speech in this case instead. *See Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). Of additional concern, the Seventh Circuit broadened *Kuhlmeier's* suppressive reach beyond "legitimate pedagogical concerns" to a realm that includes all "inappropriate" speech, as determined by the school authorities' "exercise of discretion." App. 12a.

This is a simple case that demands a *Tinker* analysis. When student speech is suppressed and punished for no legitimate reason, the effects ripple far and wide to those who merely observe the controversy and absorb the lesson to be quiet in the face of authority. This case should be summarily reversed and remanded to the Seventh Circuit for review consistent with the Court's opinion in *Morse*.

A. The Seventh Circuit Should Not Have Applied the *Kuhlmeier* Standard to Petitioner Students' Nondisruptive Political Protest That Occurred on School Premises.

This Court held in *Morse* that *Kuhlmeier* did not control that case "because no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Morse*, 127 S. Ct. at 2627. The same principle applies here. No one to whom the teen-aged students' message was directed could have reasonably believed that the shirt was school-sponsored. The students designed and paid for the shirts themselves, outside of school. The entire school knew it was not the official class shirt, and the banning the t-shirt by respondents because it was not an "official" shirt implicitly proves that they too did not consider the shirt to be school-sponsored.

Kuhlmeier applies only to the regulation by administrators of school-sponsored speech. *Morse*, 127 S. Ct. at 2627, 2637

(ALITO, J., concurring); *Giules v. Marineau*, 361 F.3d 320, 325 (2d Cir. 2006), *cert. denied* ___ U.S. ___, 127 S. Ct. 3054 (June 29, 2007). The *Kuhlmeier* Court upheld the authority of a principal to bar the school's newspapers from publishing articles about divorce and teenage pregnancy. *Kuhlmeier*, 484 U.S. at 266. The speech in *Kuhlmeier* was the paradigm of school-sponsored speech: the newspaper was part of a curriculum, it was funded by the school district, its articles were subject to pre-publication review, and the principal could fairly be regarded as its publisher. *Id.* at 262-263.

The *Kuhlmeier* Court explained the difference between the speech in *Tinker* and the articles in *Kuhlmeier*:

> The question whether the First Amendment *requires a school to tolerate particular student speech* - the question we addressed in *Tinker* - is different from the question whether the First Amendment *requires a school affirmatively to promote particular school speech*. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id. at 270-271 (emphasis added).

Because *Kuhlmeier* is not applicable to the case at hand, the Seventh Circuit should not have engaged in a discussion of the school's "basic educational mission." Relying on *Kuhlmeier*, however, the Seventh Circuit stated that "a school

need not tolerate student speech that is inconsistent with the 'basic educational mission.'" The Seventh Circuit said further: "Prohibiting children from wearing to school clothing that contains 'inappropriate' words or slogans places appropriately broad limits on the school authorities' exercise of discretion to maintain a proper atmosphere." App. 12a. Thus, not only is the Seventh Circuit's reliance on *Kuhlmeier* misplaced, but the Court also expanded the definition of "a basic educational mission" to exclude anything that school administrators deem to be inappropriate.

"A basic educational mission" cannot be defined so broadly that it prohibits any speech that is at odds with opinions of school officials. The basic educational mission argument "can be manipulated in dangerous ways." *Morse*, 127 U.S. at 2637 (ALITO, J., concurring). Some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the public officials and school administrators, which gives public school authorities "a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed," thus striking at the very heart of the First Amendment. *Id.*

B. As in *Tinker*, Petitioner Students Were Engaged in "Pure Speech," with the T-shirt Message Being That the Election Had Been a Fraud.

This Court found that the "Bong Hits 4 Jesus" sign was a "cryptic" message. *Morse,* 127 S. Ct. at 2624. However, there was never any doubt the Court was dealing with speech. In the case at hand, the District Court, applying *Texas v. Johnson*, 491 U.S. 397, 404-405 (1989), found that (1) the symbolic t-shirt contained a particularized message, that is, a protest of the t-shirt design election, and (2) it was likely that

the message would be understood by its viewers, that is, the other students and the school administration, and was therefore speech. App. 33a - 37a. Only the Seventh Circuit found that this case did not involve speech at all, stating: "The t-shirt is not protected speech, and we are doubtful that it became so by being a vehicle for eighth graders to protest the outcome of a t-shirt contest." App. 13a.

Considering how the school administration viewed petitioners' message, it seems ironic that the symbol of the shirt was powerful enough to elicit strong sustained response from the school administration, yet the Seventh Circuit panel held that the shirt was devoid of meaning sufficient to be protected by the First Amendment. Had this truly been a shirt that was devoid of meaning, the administration would have ignored it and not spent three-and-a-half months in a show-down with the teen-agers, disciplining them, banning the shirt, suspending the protest leader, and disrupting the routine and schedule of a substantial number of teachers and students in the entire school.

As in *Tinker*, the teen-aged petitioners here were engaged in "pure speech." The context of the expression is important. The medium of communication in *Tinker*, after all, was only "a band of black cloth, not more than two inches wide." *Tinker,* 393 U.S. at 514. In and of itself, the black piece of cloth contained no message. The wearing of the cloth as an armband, however, with the understanding of its meaning and message by those who wore the cloth and those who witnessed the wearing, was a powerful symbol of protest of the Vietnam War. Similarly here, wearing the t-shirt that had won the election to protest the shady circumstances of the vote and re-vote and the nondisclosure of the vote tally projected a clear message of protest that the rest of the school, including the school administrators, understood.

Petitioners further assert that their t-shirt warranted protection because this was not merely speech, but political speech. Even the Seventh Circuit recognized that the designing and wearing of the shirt was "to protest what they considered a rigged election" (App. 4a), an inherently political statement. This Court affirms in *Morse* that political speech is "at the core of what the First Amendment is designed to protect." *Morse,* 127 S. Ct. at 2626, quoting *Virginia v. Black,* 538 U.S. 343, 365 (2003). In their concurring opinion in *Morse*, Justices Alito and Kennedy state that they join in the opinion of the Court on the understanding that the opinion "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issues." *Morse,* 127 S. Ct. at 2636.

C. Petitioners' Speech Was Not Disruptive and Thus Was Protected, According to *Tinker*.

The *Tinker* Court took care to acknowledge "the special characteristics of the school environment," by permitting school officials to prohibit student speech if that speech "would substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at 509. In order to prevent the exception from swallowing the rule, the Court cautioned that, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right." *Id.* at 508; *Morse,* 127 S. Ct. at 2629.

The Seventh Circuit in the case at hand agreed with petitioners that the teen-agers' passive protest did not result in any danger or disruption at Beaubien School, other than the administrators' overreaction to the protest. The opinion brushes aside the argument of school administrators that there was a potential of danger occasioned by the t-shirt controversy, stating: "The gravity of those tensions [between

students at Beaubien] is not revealed by the record." App. 3a. Also: "[T]he evidence of tensions between the two groups of student [sic] was not developed, and so cannot be a ground for upholding the defendants' action." App. 13a. Of note, after three months of controversy, the Board called in a Crisis Intervention Team (as a face-saving maneuver, petitioners contend), that concluded in short order that there was no safety issue. Thereafter, the students were finally allowed to wear the shirts without punishment. App. 4a - 5a. No disruption ensued. Because petitioners' protest speech was not disruptive, then, pursuant to the holding in *Tinker,* it was protected. *Guiles v. Marineau,* 461 F.3d at 330.

D. School Administrators Had Engaged in Prohibited Viewpoint Discrimination.

The Seventh Circuit failed to recognize that the school administrators were engaging in viewpoint discrimination when they banned the message of the shirt. Viewpoint discrimination occurs when "the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). In *Morse,* this Court reaffirmed *Tinker's* warning that schools may not prohibit student speech because of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Morse,* 127 S. Ct. at 2626, citing *Tinker,* 393 U.S. at 508, 509. Suppressing speech based on the viewpoint expressed "strikes at the very heart of the First Amendment." *Morse,* 127 S. Ct. at 2637 (ALITO, J., concurring).

In the case at hand, once the design lost the vote (or so respondent school officials said) and the protest was being planned and executed around the design, the design was forbidden. The Beaubien principal created a rule specifically

targeting petitioners' design because of the protest and in doing so was intentionally suppressing the students' message that the election was a fraud and their design should have won. The principal knowingly violated the students' First Amendment rights because he disagreed with their message. His action was viewpoint discrimination.

E. Petitioners' Damages Were Quantifiable and Substantive, Not Minuscule as the Seventh Circuit Held.

This Court in *Morse* painstakingly and seriously analyzed the First Amendment rights of Joseph Frederick without minimizing or trivializing his damages. In contrast, the Seventh Circuit in the case at hand held that the damages of the 24 teen-agers in this case are "minuscule to the point of nonexistent," and consequently there was no violation of the First Amendment. App. 7a.

This conclusion of the Seventh Circuit ignores the fact that, because of summary judgment, petitioners were never given the opportunity to fully develop at trial the damages aspect of their case, where an expert, a school administrator, and the school psychologist would have testified that respondents' actions adversely affected the students' entire learning process for half of a school year. Petitioners were barred from making and wearing their t-shirt for more than three months, from respondents' first threats of suspension in the middle of February 2003, until May 23, 2003, when the students were finally allowed to wear their shirts without fear of punishment. *R200-17, p16.* During that period, they were barred from protesting school policy and their free speech was curtailed. This Court has held that "the loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).[2]

The injury in this case is quantifiable. In addition to the stifling of free speech, all members of the class were charged with and penalized for violation of the Board of Education's Uniform Discipline Code; all members of the class were confined to their homeroom on at least 10 separate days, depriving them of computer labs, science labs and physical education instruction, and all after-school activities, as well as denying access to bathrooms and the cafeteria; all members of the class were regularly ridiculed, demeaned and intimidated for daring to stand up to authority; various members of the class were defamed through issuance of false, retaliatory, and back-dated incident reports; and the leader of the protest, petitioner Brandt, was suspended on false charges in retaliation for his role in the protest. *CA7 App. B-3, ##11, 12; CA7 App. B-1; R200-1, p96.*

In *City of Watseka v. Ill. Public Action Council*, 796 F.2d 1547, 1559 (7th Cir. 1986), *judgment aff'd* 479 U.S. 1048

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[2] The Seventh Circuit said that since only "a particular means of protest" was forbidden, there was no constitutional violation. App. 10a - 11a. To suggest that appeals to the principal to change his decision were a reasonable substitute for an attempt to inform the entire school of the unfairness of the election process misses the point, not to mention the fact that other routes to communication were also suppressed. Petitioners were told that if they continued circulating their petitions regarding the shirt among students, they would be suspended, and so would the students signing the petitions. App. 26a - 27a; *CA7 App. B-3, #10.* The Second Circuit in *Guiles v. Marineau*, rejected a "no harm, no foul contention" of the school administrators resulting from censorship of part of the student's t-shirt message. 361 F.3d at 331.

(1987), a First Amendment case, the Supreme Court affirmed the Seventh Circuit's recognition that deprivation of a particular right in particular circumstances is a compensable injury that might justify "substantial money damages." This Court has not limited compensatory damages, "even in cases where the monetary value of the particular injury is difficult to ascertain." *Id.* In *Crue v. Aiken,* 370 F.3d 668, 677 (7th Cir. 2004), the Seventh Circuit affirmed the district court decision, which included an award of $1000 to each plaintiff, plus attorneys' fees, against the school for barring plaintiffs from discussing the Chief Illiniwek controversy with potential student athletes.

CONCLUSION

Petitioners Michael D. Brandt, Rebecca L. Darugar, and Aldo S. K. Van Enck, on behalf of themselves and all others similarly situated, respectfully request that the United States Supreme Court grant a writ of certiorari, summarily vacate the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, and remand the case to said Court of Appeals for reconsideration in light of this Court's decision in *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (June 25, 2007). *See, e.g.*, *Board of Trustees of the Univ. of Illinois v. Doe*, 119 S. Ct. 2016 (1999).

Respectfully submitted,

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August 30, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 06-1999, 06-2573

[Filed April 2, 2007]

MICHAEL D. BRANDT, on behalf of himself and all others similarly situated, Plaintiffs-Appellants,	)
v.	)
BOARD OF EDUCATION OF CITY OF CHICAGO, et al., Defendants-Appellees.	)

Before Hon. Richard A. Posner, Circuit Judge. Hon. Kenneth F. Ripple, Circuit Judge. Hon. Ann Claire Williams, Circuit Judge.

ORDER

On March 19, 2007, plaintiffs-appellants filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 06-1999, 06-2573

[Filed February 20, 2007]

MICHAEL D. BRANDT, on behalf of himself and all others similarly situated,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF CITY OF CHICAGO, et al.,
Defendants-Appellees.

POSNER, *Circuit Judge*. This class action suit was brought on behalf of 24 eighth graders at a Chicago public school called the Beaubien Elementary School. They were disciplined for conducting a protest that they claim is privileged by the free-speech clause of the First Amendment, held applicable to state action by the Fourteenth Amendment. The suit was dismissed on the defendants' motion for summary judgment, so we state the facts as favorably to the plaintiffs as the record permits.

Every year the eighth graders choose a class T-shirt. Among the designs submitted for the 2003 contest was

plaintiff Michael Brandt's; his mother is the plaintiffs' lead counsel. Brandt was in the school's program for gifted students. The program draws from all over Chicago. The other students in the school, the ones who are not in the gifted program, are local. There are some tensions between the "gifties," as the students in the gifted program call themselves, and the "tards," a derogatory term (short for "retards") sometimes applied by gifties to the other students. The gravity of those tensions is not revealed by the record.

The gifties had agreed to vote en bloc for Brandt's T-shirt design, and when it lost they smelled a rat, and submitted a protest to the principal. Some 30 designs in all had been submitted. There were 27 gifties and 72 other students in the eighth grade; and so if the 27 voted en bloc for one design and the votes of the 72 other students were scattered across the 29 other designs, the gifties' design would be almost certain to obtain a plurality of the votes. Yet when the ballots were counted, the teacher in charge of the contest announced that the vote was too close to call. She ordered a revote limited to three of the designs, one of them Brandt's; and with only two competing designs, the gifties' bloc-voting scheme failed. The teachers' practice, it turned out, was to conduct a revote among the top three contenders if the initial vote did not produce a winner with a majority, not merely a plurality, of the votes cast. The winning design unfortunately is not in the record, but apparently it was inoffensive, with an animal and a cap depicted on the front of the shirt and the names of all the eighth graders listed on the back.

The gifties were indignant. When the teacher refused to explain her runoff system or how the votes had been counted and what the tally had been, Brandt added the words "Gifties 2003" to the back of his T-shirt design; shirts incorporating the design were produced; and the gifties wore those shirts in

school instead of the T-shirt that had won the contest. (A photocopy of the shirt is appended to this opinion.) They did this both to protest what they considered a rigged election and because they thought that Brandt's design represented the gifties better than the winning (and therefore the official) class T-shirt did.

In wearing the Brandt shirt, the gifties were acting in defiance of the principal of the Beaubien school, who having gotten wind of their plan had told them that wearing the shirt would show disrespect for him and create a risk to the good order of the school, presumably because it might offend the students who had voted for the winning T-shirt, although he did not make this point explicitly. An assistant principal warned that if they wore the shirt the gifties would be violating a provision (since changed) of the Chicago Public Schools' Uniform Discipline Code that prohibited students from wearing clothing with "inappropriate words or slogans," and would be punished.

Despite this warning, the gifties went ahead with their plan. But, craftily, they first wore the forbidden shirt on the day when city-wide tests were administered to public school students. They figured the school would not take disciplinary action against them on that day, lest that lower the school's average test scores (they are gifties, after all). But on each of nine subsequent days, the shirt was worn by at least one gifty, and each time all the gifties were punished by being confined to their homeroom, as a result missing gym, science lab, computer lab, and after-school activities. Eventually the school summoned a "Crisis Intervention Team" from the Board of Education, and it investigated and decided that the wearing of the Brandt T-shirt by the gifties was not a safety problem (that is, would not lead to violent altercations with

the other eighth graders), so the gifties were permitted to resume wearing the shirt.

The plaintiffs seek both equitable relief and damages. Originally they sought an injunction against the "inappropriate words or slogans" rule and an order that the school expunge any record of the disciplinary action taken against the gifties. Not only were the gifties ultimately permitted to wear the Brandt T-shirt, but the rule has been changed; and so the plaintiffs have dropped their request for an injunction. In any event, they're all now in high school, having graduated from the eighth grade years ago; their quest to enjoin the rule is therefore moot. *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 129, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975) (per curiam); *DeFunis v. Odegaard*, 416 U.S. 312, 318-19, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) (per curiam); *Stotts v. Community Unit School District*, 230 F.3d 989, 991 (7th Cir. 2000). They could not invoke the exception, to the normal rule of mootness, for claims that are "capable of repetition, yet evading review," *Roe v. Wade*, 410 U.S. 113, 124-25, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), because it requires that the claim be repeatable by the same plaintiff. *Weinstein v. Bradford*, 423 U.S. 147, 148-49, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975) (per curiam); *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (per curiam); *Majors v. Abell*, 317 F.3d 719, 722-23 (7th Cir. 2003); *Stotts v. Community Unit School District*, *supra*, 230 F.3d at 991; *Donovan v. Punxsutawney Area School Board*, 336 F.3d 211, 216-18 (3d Cir. 2003)—a condition rarely satisfied other than in abortion and election cases, though it could be satisfied in a school case, see *Jones v. Illinois Dep't of Rehabilitation Services*, 689 F.2d 724, 727-28 (7th Cir. 1982), if for example the suit was over something that had happened at the end of one school year but could happen again at the end of the next year and the plaintiff would still

be in school then. But the condition is impossible to satisfy in this case, as none of the plaintiffs will ever again be gifties or subject to the superseded clothing rule.

The school has retained no records of the discipline meted out to the gifties over the T-shirt incident, which would seem to moot the other equitable claim, the claim that the record of their discipline be expunged. But they are asking that the school authorities be forbidden to *tell* anyone that the gifties were punished for wearing the Brandt T-shirt. There is a touch or irony in the claim, since by filing this suit the plaintiffs have spread far and wide the information concerning their conduct and the school's response to it; the suit has attracted a fair amount of publicity. See www.google.com/search?hl=en&q=gifties+beaubien+brandt, visited Jan. 26, 2007. There is further irony in requesting in a suit based on freedom of speech an order curtailing the defendants' freedom of speech. Suppose the principal of Beaubien Elementary School decided to write a memoir in which he planned to discuss the T-shirt brouhaha— maybe it was the most exciting episode in his career as a school administrator. Should he be enjoined from doing that? He *could* be enjoined, as it is a myth that all injunctions against free speech are barred by the First Amendment as "prior restraints," see, e.g., *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762-66, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994); *Snepp v. United States*, 444 U.S. 507, 510 n. 3, 100 S. Ct. 763, 62 L. Ed. 2d 704 (1980) (per curiam); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389-90, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973); *Near v. Minnesota*, 283 U.S. 697, 715-16, 51 S. Ct. 625, 75 L. Ed. 1357 (1931); *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979), but only if there was evidence that the defendants were likely to conduct a vendetta against the gifties—were trying to block

their access to college or to good jobs by spreading the word that they had been punished for wearing an unofficial T-shirt. The plaintiffs do not claim to have any evidence of so improbable a plot.

Sufficient unto the day is the evil thereof. Any defendants who in a spirit of vengeance spread the word that the gifties were disciplined will be vulnerable, at least in principle, to a suit for defamation unless they make clear that the discipline that they imposed had been disapproved by the Board of Education's Crisis Intervention Team. Conceivably they would be vulnerable to being sued for committing other torts as well, such as depicting a person in a false light or interfering with his actual or prospective contracts, for example with a possible employer. Of course no college or employer would be likely to be much concerned with mild discipline meted out to an eighth grader. An air of unreality clings to every aspect of this litigation.

But we must trudge on, and consider the plaintiffs' damages claim. Even multiplied by 24 (the number of members of the plaintiff class), the damages sustained by an eighth grader as a consequence of missing phys ed and labs on nine days out of an entire school year are minuscule to the point of nonexistent; and *de minimis non curat lex* (the law doesn't concern itself with trifles) is a doctrine applicable to constitutional as to other cases. *Ingraham v. Wright*, 430 U.S. 651, 674, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); *United States v. Broomfield*, 417 F.3d 654, 656 (7th Cir. 2005); *Hessel v. O'Hearn*, 977 F.2d 299, 303-04 (7th Cir. 1992); *Linwood v. Board of Education*, 463 F.2d 763, 767-68 (7th Cir. 1972). It is true that nominal damages can be awarded for a constitutional violation, *Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); *Calhoun v. DeTella*, 319 F.3d 936, 940-41 (7th Cir. 2003), as is

sometimes true for other intentionally tortious conduct as well. E.g., *Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644, 693 N.E.2d 510, 514, 230 Ill. Dec. 381 (Ill. App. 1998); *Sanchez v. Clayton*, 117 N.M. 761, 877 P.2d 567, 573 (N.M. 1994). But such an award presupposes a violation of sufficient gravity to merit a judgment, even if significant damages cannot be proved; and this is not such a case. In any event there has been no constitutional violation.

The plaintiffs do not argue that the Brandt T-shirt is itself protected speech. They are right not to make such an argument. Although freedom of speech and of the press—the relevant terms in the First Amendment—are often loosely paraphrased as "freedom of expression," and clothes are certainly a way in which people express themselves, clothing as such is not—not normally at any rate—constitutionally protected expression. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507-08, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 389 (6th Cir. 2005) (12-year-old "Amanda Blau's desire to wear clothes she 'feel[s] good in,' as opposed to her desire to express 'any particular message' " held not to be protected speech). Self-expression is not to be equated to the expression of ideas or opinions and thus to participation in the intellectual marketplace. Nor is the kind of "message" that clothing normally sends—"I am rich," "I am sexy," "I have good taste," and so forth— intended to contribute to competition in that marketplace.

Of course there can be speech printed on clothing, political symbols such as a swastika or a campaign button affixed to clothing, and masks and costumes that convey a political or other message. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989), and cases cited there. Merely wearing clothes inappropriate

to a particular occasion could be a political statement. For that matter, parading in public wearing no clothing at all can, depending on the circumstances, convey a political message. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460-61 (4th Cir. 2005); *United States v. Various Articles of Merchandise*, 230 F.3d 649, 658-59 (3d Cir. 2000); *Huffman v. United States*, 152 U.S. App. D.C. 238, 470 F.2d 386, 399 (D.C. Cir. 1971). But the picture and the few words imprinted on the Brandt T-shirt are no more expressive of an idea or opinion that the First Amendment might be thought to protect than a young child's talentless infantile drawing which Brandt's design successfully mimics. Otherwise every T-shirt that was not all white with no design or words, with not even the manufacturer's logo or the owner's name tag, would be protected by the First Amendment, and schools could not impose dress codes or require uniforms without violating the free speech of the students, a proposition sensibly rejected in the *Blau* case.

The plaintiffs argue, however, that when worn as part of a protest against the election to choose the official class shirt, the Brandt T-shirt *became* protected expression. That is not a ridiculous argument. If Irish people were forbidden to wear green on St. Patrick's Day, a natural form of protest would be to wear green on that day. Cf. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 303-05, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). But the importance of context cuts both ways. The protesters in this case are schoolchildren. They are privileged schoolchildren in a school that contains a majority of nonprivileged children. They insist that unless their T-shirt is adopted by the entire eighth grade, they will as it were secede, and flaunt their own T-shirt. They do not recognize the principal's authority or the legitimacy of the school's procedures for determining the winner of contests.

We have our doubts whether the constitutional privilege to engage in protest demonstrations in the name of free speech extends to eighth graders. The plaintiffs' lawyer told us at argument that the clause extends at least as far down the maturity ladder as a 10-year-old (a proposition in profound tension with *Muller by Muller v. Jefferson Lighthouse School,* 98 F.3d 1530, 1538-39 (7th Cir. 1996), and *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 736-38 (7th Cir. 1994), and cases cited there), and that the object of the protest is irrelevant. It could be, she acknowledged, a protest against the brand of ketchup served in the school cafeteria. She insists that the school's authority to prevent or punish such protests must be decided by a jury asked to strike the balance between free speech and school order. If she is right, then from now on public school policies and practices will be determined in this circuit by juries rather than by school authorities. Cf. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

But we need not go so far as to deny that eighth graders have *any* First Amendment rights, for it is plain that the school did not violate the amendment by attempting, albeit with distinctly limited success because of the decision of the Crisis Intervention Team, to exclude the Brandt T-shirt from the school. We must be precise about the right that the plaintiffs sought to vindicate by protesting. It is the right to an explanation by the school for how the election to pick an official eighth-grade T-shirt was conducted. We do not think eighth graders have such a right. For the school to hold an election for class T-shirt and rig the results, as the plaintiffs suspect happened, is probably not a recommended educational practice, but it is not an infringement of any legal right.

In any event, it was not the protest as such that was forbidden, but merely a particular means of protest. The

gifties were free to protest in more conventional, less potentially disruptive, ways than by the wearing of the Brandt T-shirt. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (plurality opinion); *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1014 (9th Cir. 1996). They did so—they petitioned the principal and made a presentation to the Local School Council at the principal's urging and were not punished for doing so. Their parents amplified the gifties' voices of protest. With many routes of communication open to the gifties, the closing of the T-shirt route inflicted the most minimal of possible injuries, if injury at all (as we doubt), to the First Amendment.

Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries. Academic freedom, "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 602, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967), is not just the freedom of teachers, school authorities, and to an extent students to express ideas and opinions. "It includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts." *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc); see also *Grutter v. Bollinger*, 539 U.S. 306, 328-30, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985); *Piarowski v. Illinois Community College District 515*, 759 F.2d 625, 629-30 (7th Cir. 1985). Most of the cases that honor that interest involve colleges and universities, but their principle applies with equal if not greater force to lower schools as well, see, e.g., *Chicago Board of Education v. Substance, Inc.*, 354 F.3d 624, 630-31 (7th Cir. 2003), and

implies that the principals of those schools have discretion to regulate students' conduct in order to maintain an atmosphere conducive to learning. E.g., *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655-56, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995); *Baxter by Baxter v. Vigo County School Corp.*, *supra*, 26 F.3d at 737. Just weeks ago we held that an elementary-school teacher has no "constitutional right to introduce his own views on the subject but must stick to the prescribed curriculum—not only the prescribed subject matter, but also the prescribed perspective on that subject matter." *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 2007 WL 162833 at *1 (7th Cir. 2007). So if, contrary to what we said earlier, the Brandt T-shirt is "speech," still we must not ignore the Supreme Court's admonition that "a school need not tolerate student speech that is inconsistent with its 'basic educational mission.' " *Hazelwood School District v. Kuhlmeier*, *supra*, 484 U.S. at 266.

Prohibiting children from wearing to school clothing that contains "inappropriate" words or slogans places appropriately broad limits on the school authorities' exercise of discretion to maintain a proper atmosphere. Tighter limits, expressed in precise rules, would prevent them from responding to novel challenges well illustrated by the present case. Whatever the Crisis Intervention Team may have thought with the benefit of hindsight, the principal of the Beaubien school had to decide *before* the T-shirt protest, and therefore with less information than the Crisis Information Team had, whether to permit the gifties to protest the election results by flouting the official T-shirt. After having reasonably decided not to permit such conduct, he had to decide whether to allow the gifties to defy his prohibition, and he again reasonably decided that the imposition of mild discipline was necessary in order to affirm his authority and maintain order.

He may, of course, have been wrong. But the existence of discretion implies a license to make mistakes. An exercise of official discretion is reversible by a court only when the official can be said to have abused his discretion, implying conduct not merely mistaken in retrospect but unreasonable. E.g., *Zhou v. Guardian Life Ins. Co.*, 295 F.3d 677, 679-80 (7th Cir. 2002); *Morton v. Smith*, 91 F.3d 867, 870 (7th Cir. 1996). The principal (himself an alumnus of the eighth grade at Beaubien Elementary School) did not abuse his discretion.

We do not accept all the arguments that the defendants press on us. They say that the Brandt T-shirt had to be banned because it ridicules students with disabilities—the right hand of the cartoon figure is deformed. It is more likely that Brandt simply can't draw very well. Nevertheless the principal would have been justified in banning the wearing of the shirt had he reasonably believed that it would be offensive to disabled children. But that was not his ground. The defendants also contend that there was a danger that the non-gifted children would be incensed by the gifties' refusal to accept the result of the election, and violence might result; there apparently had been a shoving incident between a "gifty" and a "tard" a week before the gifties started wearing the Brandt T-shirt. But the evidence of tensions between the two groups of student was not developed, and so cannot be a ground for upholding the defendants' actions.

There is, however, ground enough, as we have explained. The T-shirt is not protected speech, and we are doubtful that it became so by being a vehicle for eighth graders to protest the outcome of a T-shirt contest. If protected at all, it was not immune from reasonable regulation by the school authorities.

The plaintiffs argue finally that the district judge should not have ordered them to pay the defendants' costs. There is

no possible merit to the argument. They have made the defendants jump through a number of costly hoops in this protracted litigation and must bear the usual consequences of failed litigation.

AFFIRMED.

**[SEE FOLDOUT PAGES FOR
7TH CIRCUIT OPINION
EXHIBITS A AND B]**

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 04 C 904

[Filed May 8, 2006]

Brandt	)
	)
vs.	)
	)
Board of Education	)
	)

DOCKET ENTRY TEXT

Defendant's Bill of Costs is granted in part and denied in part. The Court awards the Board $10,556.20 in costs.

STATEMENT

On March 13, 2006, the Court granted Defendants' Motion for Summary Judgment dismissing Plaintiffs' First Amendment lawsuit. As such, Defendant Board of Education for the City of Chicago is a prevailing party. Before the Court is the Board's Bill of Costs pursuant to Federal Rule of Civil Procedure 54(d). Defendant seeks a total of $10,688.40, which constitutes subpoena fees, court reporting transcription

fees, and photocopying expenses. For the following reasons, the Court awards the Board $10,556.20 in costs.

Federal Rule of Civil Procedure 54(d) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d)(1). Recoverable costs include: (1) clerk and marshal fees; (2) fees for necessary transcripts obtained for use in the case; (3) witness fees and expenses; (4) fees for copies of papers necessarily obtained for use in the case; (5) docket fees; and (6) compensation for court-appointed experts and interpreters. *See* 28 U.S.C. § 1920; *see also Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 945 (7th Cir. 1997). There is a strong presumption in favor of awarding costs to the prevailing party under Rule 54(d). *Majeske v. City of Chicago*, 218 F.3d 816, 824 (7th Cir. 2000). The Court, in its discretion, may tax costs against the non-prevailing party when the cost imposed is recoverable and the amount assessed is reasonable. *Id.*

Plaintiffs first take umbrage with the fact that the Bill of Costs was filed only by Defendant Board of Education and not the other Defendants in this lawsuit. As the Board explains, the other Defendants did not file a Bill of Costs because they did not incur costs. Further, the Board elucidates via affidavit that the costs were incurred by the Board alone. As such, Plaintiffs' argument is baseless. The Court thus turns to the Board's Bill of Costs.

I. Depositions Costs - 28 U.S.C. § 1920(2)

At the outset, the Court acknowledges that the Board provided photocopies of all deposition transcripts to Plaintiffs at their request saving Plaintiffs substantial court reporter fees. Presently, the Board requests deposition costs in the

amount of $9,723.60 pursuant to 28 U.S.C. § 1920(2). In support of this request, the Board has submitted a detailed itemization of these costs and the related invoices.

Plaintiffs argue that certain depositions were not submitted in connection with any motion, and therefore, these costs cannot be taxed. Deposition charges, however, may be awarded if the deposition appears reasonably necessary in light of the facts known at the time of the deposition. *See Mother & Father v. Cassidy*, 338 F.3d 704, 712 (7th Cir. 2003); *Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 455 (7th Cir. 1998). Further, the introduction of a deposition at trial is not a prerequisite for a finding that it was necessary to take a deposition. *Finchum v. Ford Motor Co.*, 57 F.3d 526, 534 (7th Cir. 1995). The two deponents at issue were identified by plaintiffs as persons with knowledge relevant to the complaint. One of the deponents was a class member. Accordingly, these depositions were reasonably necessary in light of the facts known at the time of the depositions.

Under the Northern District of Illinois Local Rule 54.1(b), the costs of the transcript or deposition shall not exceed the regular copy rate established by the Judicial Conference of the United States. The applicable rate pursuant to the Judicial Conference for depositions conducted after February 28, 2003, is $3.30 per page per ordinary transcript. *See Vigortone Ag Prods., Inc. v. PM Ag Prods. Inc.*, No. 99 C 7049, 2004 WL 1899882, at *6 (N.D. Ill. Aug. 12, 2004).

Here, although none of the taxed depositions cost over $3.30 per page, Plaintiffs contend – without citation to any legal authority – that the attendance and overtime fees should be disallowed. Plaintiffs' argument fails because the Court has discretion to award attendance fees under Section 1920(2) as part of the reasonable and necessary costs in obtaining a

deposition transcript. *See Held v. Held*, 137 F.3d 998, 1002 (7th Cir. 1998). Further, overtime charges that were incurred to accommodate the schedules of Plaintiffs and their witnesses are proper. *See Finchum*, 57 F.3d at 534. Last, Plaintiffs have made no showing that these itemized costs are not reasonable.

During the course of this litigation, the Court granted Defendants' motion to take more than the ten depositions allowed by Federal Rule of Civil Procedure 30(a)(2)(A). Now Plaintiffs request that the Court reduce the depositions costs because the Board has submitted a Bill of Costs including fourteen transcripts. The Court declines Plaintiffs' request, especially in light of the fact that the Board provided photocopies of all deposition transcripts to Plaintiffs saving Plaintiffs substantial court reporter fees.

In sum, the Court awards $9,723.60 under Section 1920(2) because these costs are allowable and reasonable. *See Majeske*, 218 F.3d at 824.

II Subpoena Fees - 28 U.S.C. § 1920(1)

The Board also seeks costs associated with the subpoena fees for Steven Herzog, Jerry Schecter, and Diane Haak pursuant to Section 1920(1). Service fees may not exceed amounts charged by the United States Marshal Service which is $45.00 per hour and $0.365 per mile. *See Collins v. Gorman*, 96 F.3d 1057, 1060 (7th Cir. 1996); *see also* 28 C.F.R. § 0.114(a)(3). Here, the costs were under $45.00 per person, and thus are reasonable. Plaintiffs, however, contend that Defendants Laughlin and Clancy issued these subpoenas and the Board did not respond to this assertion. Accordingly, it appears that these subpoena costs were not incurred by the Board, and thus are not recoverable under the circumstances.

III.Photocopying Costs – 28 U.S.C. § 1920(4)

Next, the Board seeks $832.60 in photocopying costs under 28 U.S.C. § 1920(4), which allows a judge to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." Courts interpret this section to mean that photocopying charges for discovery and court copies are recoverable, but charges for copies made for attorney convenience are not. *See McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990).

Plaintiffs object to this award because the Board is seeking $.20 per page. This rate is within the reasonable rate range of $.10 to $.20 per page. *See Harkins v. Riverboat Serv., Inc.*, 286 F.Supp.2d 976, 982 (N.D. Ill. 2003); *see also Helzing v. Loyola Univ. of Chicago*, No. 02 C 9408, 2004 WL 2608287, at *4 (N.D. Ill. Nov.16, 2004); *Vardon Golf Co., Inc. v. Karsten Mfg. Corp.*, No. 99 C 2785, 2003 WL 1720066, *11 (N.D. Ill. March 31, 2003); *Figueroa v. City of Chicago*, No. 97 C 8861, 2000 WL 1036019, at *2 (N.D. Ill. July 20, 2000).

The Board has also submitted the charge of $66.00 for the transcription of a court hearing on May 16, 2004. *See SK Hand Tool Corp. v. Dresser Indus., Inc.*, 852 F.2d 936, 944 n. 9 (7th Cir. 1988) (costs of pretrial proceeding transcripts are taxable as costs under Rule 54(d)). Plaintiffs contend that the Board has failed to attach an invoice for these charges. As the cancelled check attached to the Bill of Costs reflects, this transcription was done by this Court's court reporter, Joseph Rickhoff. Therefore, Plaintiffs' argument as to this cost fails.

In sum, the Court, in its discretion, awards the Board $832.60 in photocopying costs under 28 U.S.C. § 1920(4).

IV. Conclusion

Finally, the Court rejects Plaintiffs' argument that because this case was "close" and "difficult," the Board's costs should be denied. *See Association of Mexican-American Educators v. California*, 231 F.3d 572, 592 (9th Cir. 2000). As the Board correctly asserts, Plaintiffs brought an Amended Complaint against five Defendants and lost on all counts. Further, Plaintiffs' "difficult" argument is not supported by the law of this Circuit.

The Court also rejects Plaintiffs' argument that because they are minors, there is a great economic disparity between the parties. As Plaintiffs are well aware, ***the parents*** of minor Plaintiffs Michael Brandt, Rebecca Darugar, and Aldo Van Enck filed the Amended Class Action Complaint on behalf of their children and all others similarly situated against the five Defendants. Finally, Irene Dymkar, one of the lead attorney for the Plaintiffs, is the mother of one of the minor Plaintiffs.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 04 C 0904

[March 13, 2006]

MICHAEL D. BRANDT, minor, by his parent, STEPHEN M. BRANDT; REBECCA L. DARUGAR, minor, by her parent, LORI DARUGAR; ALDO S. K. VAN ENCK, minor, by his parent, SARA KATAYANAGI VAN ENCK; on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO; CHRIS N. KOTIS, individually and officially; JANICE M. ROSALES, individually and officially; CHRISTINE LAUGHLIN individually and officially; MARY CHANCY, individually and officially,
Defendants.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

The parents of minor Plaintiffs Michael Brandt, Rebecca Darugar, and Aldo Van Enck filed the present Amended Class Action Complaint on behalf of their children and all others similarly situated against Defendants Board of Education of the City of Chicago, Chris Kotis, Janice Rosales, Christine Laughlin, and Mary Clancy. In their Amended Complaint, Plaintiffs allege that Defendants violated their First Amendment right to free speech. *See* 42 U.S.C. § 1983. Before the Court are the parties' Cross-Motions for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(c). For the following reasons, the Court denies Plaintiffs' Partial Motion for Summary Judgment and grants Defendants' Motions for Summary Judgment.

BACKGROUND

I. Northern District of Illinois Local Rules

When determining summary judgment motions, the Court derives the background facts from the parties' Northern District of Illinois Local Rule 56.1 statements. The Local Rules provide parties with specific details as to how litigants in the Northern District of Illinois should approach summary judgment motions and responses. Local Rule 56.1(a)(3) requires the moving party to provide "a statement of material facts as to which the moving party contends there is no genuine issue." Local Rule 56.1(b)(3) requires the nonmoving party to admit or deny every factual statement proffered by the moving party and to concisely designate any material facts that establish a genuine dispute for trial. The parties' statements must contain short numbered paragraphs including

references to the affidavits, parts of the record, and other supporting materials. *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 817 (7th Cir. 2004); *Malec v. Sanford*, 191 F.R.D. 581, 583-85 (N.D. Ill. 2000).

It is not appropriate to set forth additional facts in a Rule 56.1(b)(3) response statement, instead, the parties must include any additional facts in a separate Rule 56.1 statement. *See Ammons*, 368 F.3d at 817. Responses that are not contested are deemed admitted. *Brengettcy v. Horton*, 423 F.3d 674, 681 (7th Cir. 2005); *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003). Statements and responses that do not properly cite to the record are subject to the Court's discretion as to their admissibility. *See Brasic v. Heinemann's Inc.*, 121 F.3d 281, 284 (7th Cir. 1997). The Court also reminds the parties that when citing to the record in their legal memoranda, they are required to cite to the numbered paragraphs of the Local Rule 56.1 Statements and not to the underlying record. *See Malec*, 191 F.R.D. at 586. With these principles in mind, the Court turns to the relevant facts of this case.[1]

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[1] In their Reply Brief, Plaintiffs argue that Defendants' use of their Joint Rule 56.1(a)(3) Statement of Facts in response to Plaintiffs' Partial Motion for Summary Judgment is prohibited by the local rules. Plaintiffs have not cited any legal authority supporting this argument and the Court has found none. Meanwhile, Plaintiffs' allegation that they cannot adequately respond to Defendants' Joint Rule 56.1 Statement in this context is disingenuous because Plaintiffs have already responded to Defendants' statement in detail. (*See* R. 166-1, Pls.' Resp. to Defs.' Stmt.)

II. Relevant Facts

A. Parties

Plaintiffs are a certified class of 24 of the 27 students who were in the eighth grade class in the Regional Gifted Center Program at Jean Baptiste Beaubien Elementary School ("Beaubien School") in Chicago, Illinois, during the 2002-03 school year. (R. 134-1, Pls.' Rule 56.1 Stmt. P 1; R. 140-1, Defs.' Joint Rule 56.1 Stmt. P 2.)

Defendant Board of Education of the City of Chicago ("Board") is a body politic and corporate in charge of overseeing the management and operations of a system of free schools known as the Chicago Public Schools. (Pls.' Stmt. P 2.) Defendant Chris Kotis is the Principal of Beaubien Elementary School and was the Principal during the relevant time period. (*Id.* P 3; Defs.' Stmt. P 3.) The Board of Education has adopted a rule that specifically authorizes principals to exercise control over the school in all areas authorized by Illinois statute. (Defs.' Stmt. P 9.) The Uniform Discipline Code ("UDC"), a series of rules and regulations that categorize different types of rule infractions and prescribe a range of consequences for each type of infraction, further defines Principal Kotis' role. (Defs.' Stmt. P 10.) For example, the UDC requires students to dress in a manner that neither disrupts the educational process nor poses a safety hazard. (*Id.* PP 13, 22; R. 160-1, Pls.' Stmt. Add'l Facts P 30.)

Defendant Mary Clancy was the Gifted Program Coordinator at Beaubien School during the 2002-03 school year. (Pls.' Stmt. P 6; Defs.' Stmt. P 4.) Defendant Christine Laughlin was the Assistant Principal at Beaubien School during the 2002-03 school year. (Pls.' Stmt. P 5; Defs.' Stmt.

P 5.) Defendant Janice Rosales was the Chicago Public Schools Area Instructional Officer ("AIO") for Region One, Area One, which encompassed Beaubien School during the 2002-03 school year. (Pls.' Stmt. P 4; Defs.' Stmt. P 6.)

B. The T-Shirt

Beaubien School held an annual contest among the eighth grade students to determine the design for the class T-shirt. (R. 35-1, Am. Compl. P 32.) In the second semester of school year 2002-03, students submitted twenty designs for the Class of 2003 T-shirt election. (*Id.* P 33; Defs.' Stmt. PP 55, 57, 59.) The eighth grade students did not choose Plaintiff Michael Brandt's T-shirt design for the official class T-shirt. (*Id.*) Michael Brandt's T-shirt design contained the image of a boy giving a thumbs-up signal with one hand with the other arm ending in a handless nub from which a leash extended to a dog labeled the school mascot "Beaubien Bulldog." (R. 137-1, Kotis' Mot. Summ. J., Ex. 2; Am. Compl. P 34.) The boy is wearing a shirt that says, "Beaubien Class of 2003," and pants bearing a grid design. (*Id.*) After losing the T-shirt election, Plaintiffs added the word "gifties" to the back of the shirt. (Pls.' Stmt. Add'l Facts P 5.)

C. The Petition

Principal Kotis prohibited the gifted students' T-shirt design as an alternative graduation shirt because a fair vote was conducted and the alternative T-shirt did not win the election. (Defs.' Stmt., Ex. A, C. Kotis Dep., at 56.) Thereafter, the gifted students drafted a petition for the other students to sign concerning their T-shirt. (Am. Compl. P 38c; Defs.' Stmt, Ex. Z, R. Darugar Dep., at 67-70.) The petition indicated that the regular students had no objection to anyone wearing the alternative T-shirt. (Am. Compl. P 38c.) At her

deposition, Rebecca Darugar testified that "the purpose of the petition was so that we could have and wear these T-shirts." (Defs.' Stmt., Ex. Z, R. Darugar Dep., at 67.) Rebecca Darugar also testified that they were going to give the petition to the Local School Council to show that they had support for their alternative T-shirt design. (*Id.* at 68.)

D. Local School Council Meeting

Also after Principal Kotis prohibited the alternative T-shirt design, he met with the gifted class and expressed his concerns about the anger over Michael Brandt's losing design. (Defs.' Stmt. P 70 & Ex. A, Kotis Dep. at 68.) Kotis then invited the students to address the issue at the Local School Council meeting scheduled for the following week on February 19, 2003. (Defs.' Stmt. P 70.) Thereafter, Michael Brandt addressed the Local School Council. (R. 166-1, Pls.' Resp. to Defs.' Stmt. P 71.) At his deposition, Michael Brandt testified that when he addressed the Local School Council, he stated that his T-shirt design better represented the gifted students because the T-shirt "was made available to the gifted students, people who I had spent combined total of thousands of hours in close contact with. We felt that us having our own shirt better represented us than having a shirt shared with people with who [sic] we hardly knew." (Defs.' Stmt., Ex. M., M. Brandt's Dep. at 116-17.) Michael Brandt also told the Local School Council that the gifted class thought they had won the T-shirt election and felt frustrated that the school did not explain to them how the voting was conducted. (Pls.' Resp. to Defs.' Stmt. P 71.) In the end, the Local School Council supported Principal Kotis' decision to prohibit the alternative T-shirts. (Defs.' Stmt. P 75.)

E. Wearing the T-Shirts to School

Despite the T-shirt's prohibition, the gifted students produced the "gifties" T-shirt and 19 of the gifted students wore the T-shirts to school on April 1, 2003. (Defs.' Stmt. P 76; Pls.' Stmt. P 14.) Gifted student Nicholas Haak testified that it was "kind of ironic that we were doing it on April Fools' Day as an April Fools' joke." (Defs.' Stmt., Ex. DD, N. Haak Dep., at 70-71.) Principal Kotis did not know that the students were wearing the T-shirts on April 1, 2003 until the Gifted Program Coordinator Mary Clancy informed him. (Defs.' Stmt. P 80.) Principal Kotis told the gifted students that they were in violation of the Uniform Disciplinary Code for failing to abide by the schools rules or regulations. (Pls.' Stmt. P 16.) The rule at issue was Beaubien School Dress Code No.2, which states in relevant part: "Clothing with inappropriate words or slogans is not permitted." (*Id.* P 9.) Thereafter, Kotis told Clancy to contact the students' parents to tell them that the students had violated a school disciplinary code for wearing the "gifties" T-shirts to school. (Defs.' Stmt. P 71; Pls.' Stmt. P 18.)

F. Tensions Between Gifted and Regular Students

Sometime between April 1 and April 4, 2003, Principal Kotis told Area Instructional Officer Rosales that hostilities existed between the gifted and regular students at Beaubien School. (Defs.' Stmt. P 93; Pls.' Stmt. Add'l Facts P 14.) After that, Rosales instructed Kotis to let her know if there were any further problems. (Defs.' Stmt. P 94.) Rosales testified that Kotis "would be monitoring the behavior of the children and encouraging the children to -- working with the teachers in order to improve the conditions of safety and security of the children, because safety was what I was

concerned about." (Defs.' Stmt. P 114, Ex B., Rosales Dep. at 46.)

At their depositions, Kotis, Clancy, and Laughlin also testified that tensions existed between the gifted and regular students. (Defs.' Stmt., Ex. R., Kotis Dep. at 9-11; Ex. N, Clancy Dep. at 41, 47, Ex. O, Laughlin Dep. at 12-14.) Kotis testified that there had been at least one physical altercation between a gifted and regular student at Beaubien School. (Defs.' Stmt., Ex. R., Kotis Dep. at 9-11; Ex. A, Kotis Dep. at 83.) In addition, Laughlin testified that there had been incidents after school between gifted and regular students. (Defs.' Stmt., Ex. O, Laughlin Dep. at 12-14.) Moreover, Clancy testified that she thought that the gifted students' design on the T-shirt insulted students with physical deformities. (Pls.' Stmt. Add'l Facts P 5.)

A number of gifted students wore the T-shirts again on May 12, 2003. (Defs.' Stmt. P 99.) Shortly thereafter, a gifted student wrote Rosales a letter about the tension between the gifted and regular students at Beaubien School. (Defs.' Stmt. P 104, Ex. C, Rosales Decl. PP 8, 10.)

G. Possible Solutions to T-Shirt Problem

Meanwhile, on May 15, 2003, Kotis and Rosales held a meeting to work with the parents to create possible solutions to the T-shirt controversy. (Defs.' Stmt. P 125.) Rosales testified that at the end of the May 15 meeting, they presented choices to the parents and students, including "that they could have their -- I believe that they could have their T-shirt, keep it as it was and stay in their classroom and receive all of their classes, 100 percent of their program in their classroom...." (*Id.* P 126; Ex. B, Rosales Dep. at 77.) Rosales further testified that the students could also cover the word "gifties"

on the T-shirt and then they would have access to anywhere in the school. (*Id.;* Ex. B, Rosales Dep. at 77.) The next day, Rosales presented the options to the gifted class. (*Id.* P 126(a)). After that, at least one gifted student wore the banned T-shirt to school every day until May 23, 2003. (Defs.' Stmt., Ex. Z, Darugar Dep. at 42.)

H. Crisis Intervention Team

Consequently, Rosales contacted the Crisis Intervention Office at the Board of Education's central office concerning the T-shirt controversy at Beaubien School. (Defs.' Stmt. P 127.) The Crisis Intervention Team included a facilitator and Beaubien School's counselor, social worker, and psychologists who worked with both the regular and gifted students. (*Id.* P 128.) From May 19 until 23, 2003, the Crisis Team spoke directly to each of the three eighth grade classes, including the gifted class. (*Id.* P 129; R. 167-1, Pls.' Appendix, Ex. D, Crisis Team Report.) The Crisis Intervention Team's report stated in pertinent part: "In the General Education classroom (300, 310) the students were not concerned that the students in the gifted program were wearing a shirt different from the class shirt. They were concerned that a consequence of the T-shirt issue would be loss of their Eighth Grade Yearbook, loss of their class trip to Springfield, and potential disruption to graduation." (R. 167-1, Pls.' Appendix, Ex. D, Crisis Team Report, at 1.) The report also stated that the crisis team met with Principal Kotis to convey the sentiments of the students, and consequently stated that "Mr. Kotis was relieved to find that wearing the T-shirt with "Giftee" on the back did not appear to jeopardize student safety. He decided that as long as student safety was not being compromised, the students could wear the T-shirt which was in question." (*Id.*) Accordingly, after the Crisis Intervention Team's evaluation, Principal Kotis allowed the

students to wear the "gifties" T-shirts to school. (Defs.' Stmt. P 133.)

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). On cross-motions for summary judgment, the Court construes all the facts and reasonable inferences in favor of the party against whom the motion under consideration is made. *Schneider v Sentry Group Long Term Disability Plan,* 422 F.3d 621, 626 (7th Cir. 2005). The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

ANALYSIS

Plaintiffs assert that Defendants' prohibition of the "gifties" T-shirt denied the gifted students their First Amendment right to free speech. Plaintiffs further argue that the relevant school disciplinary and dress codes constituted an unconstitutional prior restraint of the gifted students' free speech. Also, Plaintiffs challenge these codes as unconstitutionally overbroad and vague. Finally, Plaintiffs allege that Defendants retaliated against the gifted students for

wearing the "gifties" T-shirts after the school administration had specifically prohibited the T-shirts.[2]

The First Amendment protects the freedom of speech and expressive conduct, and generally prevents the government from proscribing such activities. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305 (1992). First Amendment protections of speech and expressive conduct, however, are not absolute. *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506, 514, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Since the *Tinker* decision, the Supreme Court has held that schools cannot punish students for expressing their personal views at school "unless school

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[2] Plaintiffs have failed to respond to Defendants' arguments that their First Amendment retaliation claim is without merit. Accordingly, Plaintiffs have waived their retaliation claim. *See Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005) ("Perfunctory or undeveloped arguments are waived"); *see also United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We have repeatedly made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)"); *Volovsek v. Wisconsin Dep't of Agr. Trade & Consumer Protection*, 344 F.3d 680, 689 n. 6 (7th Cir. 2003) (complete absence of legal argument waives consideration of claim).

authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S. Ct. 562, 567, 98 L. Ed. 2d 592 (1988) (quoting *Tinker,* 393 U.S. at 506). Furthermore, a school need not tolerate student speech that is inconsistent with the school's basic educational mission even though the First Amendment would protect similar speech or expressive conduct outside of the school setting. *Kuhlmeier,* 484 U.S. at 266 (citing *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 685, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986)) (public school students' First Amendment rights not automatically coextensive with rights of adults in other settings).

I. Protected Speech

Defendants contend that the gifted students' wearing of the T-shirts to school was not an attempt to express any particularized message, such as a political affiliation or a protest of social issues, and that the message did not have the likelihood of being understood by those who viewed it. The First Amendment protects conduct, symbols, and non-verbal speech which express ideas or convey a message that would likely be understood by the viewer. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 296, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221 (1984); *Spence v. State of Washington,* 418 U.S. 405, 409-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). For example, in *Tinker,* the Supreme Court recognized that the expressive nature of students wearing black armbands in protest of the Vietnam War was protected speech. *See Tinker,* 393 U.S. at 505-06. Other examples of protected expressive conduct include the burning of the American flag during a political demonstration at the 1984 Republican National Convention, *see Texas v. Johnson,*

491 U.S. 397, 406, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), and the taping of a peace sign on an American flag in protest of the invasion of Cambodia and the Kent State tragedy. *See Spence,* 418 U.S. at 410.

Here, Plaintiffs contend that regardless of the content of the design, the T-shirt was made and worn as a symbol of protest. Specifically, Plaintiffs argue that the T-shirt conveyed the message that "we were cheated in the election and this is the shirt that should have won." (R. 164-1, Pls.' Mem. In Opp. to Kotis' Mot. For Summ. J., at 2.)[3] Plaintiffs bear the burden of demonstrating that the First Amendment protects their expressive conduct. *See Community for Creative Non-Violence,* 468 U.S. at 293 n.5; *Doe v. City of Lafayette, Ind.,* 377 F.3d 757, 764 (7th Cir. 2004). Specifically, "although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive." *Community for Creative Non-Violence,* 468 U.S. at 293 n.5.

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[3] Plaintiffs' alternative argument that the T-shirts were "art" and that "it goes without saying that art is expression protected by the First Amendment" is waived because Plaintiffs fail to develop their argument with supporting evidence and pertinent legal authority. *See Estate of Moreland v. Dieter,* 395 F.3d 747, 759 (7th Cir. 2005) ("Perfunctory or undeveloped arguments are waived"); *see also United States v. Turcotte,* 405 F.3d 515, 536 (7th Cir. 2005) ("unsupported and undeveloped arguments are waived.") (citations omitted).

A. Particularized Message

The Court thus evaluates whether the "gifties" T-shirt and the wearing of the T-shirt had a "particularized message." *See Community for Creative Non-Violence,* 468 U.S. at 296. Many of the gifted students' statements about the T-shirt and their wearing of the shirt to school do not indicate that they were protesting the T-shirt election. For example, Michael Brandt, the designer of the T-shirt, stated that the T-shirt was "supposed to look silly, meaning, it was suppose to look funny. It's suppose to be ironic that we were graduating eighth grade, making [sic] step into higher education and, at the same time, it's got a very goofy looking kid -- to have a very goofy looking kid on the front of a shirt that stands for the milestone of going into higher education was just ironic." (Defs.' Stmt., Ex. M., M. Brandt's Dep. at 109-10.) Other gifted students -- Rebecca Darugar and Aldo Van Enck -- testified that the T-shirt was made to represent the gifted class. (Defs.' Stmt., Ex. Z, R. Darugar Dep., at 114-15; Defs.' Stmt, Ex. UU, A. Van Enck Dep. at 17.) Further, gifted student Nicholas Haak testified that when they wore the T-shirts for the first time it was "kind of ironic that we were doing it on April Fools' Day as an April Fools' joke." (Defs.' Stmt., Ex. DD, N. Haak Dep., at 70-71.)

On the other hand, Rebecca Darugar also testified that the gifted students wore the T-shirts in protest of Kotis' decision that forbade them from wearing the T-shirts to school. (Defs.' Stmt., Ex. Z, R. Darugar Dep., at 58.) Another gifted student, Daniel Schmidt, testified that they made and wore the T-shirts to taunt the administration, although he did not explain why the gifted students were taunting the administration in the first instance. (Defs.' Stmt. P 64, Ex. CC, D. Schmidt Dep. at 49.) Furthermore, Michael Brandt told the Local School Council that the gifted class thought

they had won the T-shirt election and felt frustrated that the school did not explain to them how the voting was conducted. (Pls.' Resp. to Defs.' Stmt. P 71.)

Although Defendants argue that the students simply wore the T-shirts in defiance of the administration's prohibition of the shirts, the Court must view the facts and all reasonable inferences in a light most favorable to Plaintiffs. Accordingly, based on the facts discussed above, especially Michael Brandt's complaint to the Local School Board, Plaintiffs have established that a genuine issue of material fact exists as to whether the students wore the T-shirts in protest of the T-shirt election.

B. Likelihood of Being Understood

The Court next turns to the second half of the relevant inquiry, namely, whether viewers would understand the T-shirt's particularized message that the gifted students were protesting the T-shirt election. *See Community for Creative Non-Violence*, 468 U.S. at 296. Plaintiffs have set forth evidence that the gifted students circulated a petition about the "gifties" T-shirt, although Plaintiffs never explain what the petition actually said or provide the Court with a copy of the petition. (*See* Defs.' Stmt., Ex. Z, R. Darugar Dep., at 67.) In any event, Plaintiffs also point to evidence that because the Gifted Program Coordinator interviewed two regular students about the T-shirts, other students were aware of the gifted students' claim that the election had been unfair. (Pls.' Stmt. Add'l Facts P 9.) Finally, Plaintiffs contend that because Defendants confined the gifted students to their home room whenever anyone in the class wore the T-shirts, other students knew of the gifted students' protest. (*Id.* PP 11, 12.)

Again, viewing the evidence and all reasonable inferences in a light most favorable to Plaintiffs, as the Court is required to do at this procedural posture, they have established that there is a genuine issue of material fact whether the other students understood the particularized message about the T-shirt election.

C. Basic Educational Mission

Although there is a genuine issue of material fact as to whether the wearing of the T-shirts to school expressed a particularized message understood by its viewers, the Court must also determine whether the gifted students' speech was inconsistent with Beaubien School's basic educational mission. *See Kuhlmeier,* 484 U.S. at 266 (citing *Fraser,* 478 U.S. at 685). Specifically, students "cannot be punished merely for expressing their personal views on the school premises ... unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Kuhlmeier,* 484 U.S at 266 (quoting *Tinker,* 393 U.S. at 509).

Evidence in the record suggests that tensions existed between the gifted and regular students and that some incidents had occurred between gifted and regular students. (Defs.' Stmt. P 93; Pls.' Stmt. Add'l Facts P 14.) Also, there were some safety concerns involved. (*Id.*) There is also evidence that the design on the T-shirt may have insulted students with physical deformities. (Pls.' Stmt. Add'l Facts P 5.) Furthermore, some of the regular students were upset that the T-shirt controversy might disrupt their eighth grade yearbook, their class trip to Springfield, and graduation. (R. 167-1, Pls.' Appendix, Ex. D, Crisis Team Report, at 1.) Based on this evidence, there is a genuine issue of material fact whether the producing and wearing of the T-shirts to

school substantially interfered with the school's work or impinged upon the rights of other students.

II. Qualified Immunity

Nevertheless, the individual Defendants assert that the doctrine of qualified immunity protects them from this lawsuit. In general, qualified immunity shields government officials performing discretionary functions from civil litigation. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The goal of qualified immunity is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* Denying summary judgment any time a material issue of fact exists as to the underlying constitutional claim undermines the goal of qualified immunity. *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Accordingly, "where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Id.* at 200.

Under the doctrine of qualified immunity, "if the law did not put the [public official] on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202. When determining whether qualified immunity shields a public official from a Section 1983 action, the Court undertakes a two-part inquiry. *Jones v. Wilhelm,* 425 F.3d 455, 460 (7th Cir. 2005). The Court's first inquiry is whether the facts, viewed in the light most favorable to Plaintiffs, show that the individual Defendants violated a constitutional right. *Id.* (citing *Saucier,* 533 U.S. at 201). If the facts comprise a constitutional violation, the Court must determine whether the constitutional

right was clearly established at the time of Defendants' conduct. *Wernsing v. Thompson,* 423 F.3d 732, 742 (7th Cir. 2005) (citing *Saucier,* 533 U.S. at 201).

Assuming *arguendo* that Plaintiffs have established that Defendants violated their First Amendment right to free speech because a genuine issue of material facts exists as to that question, the Court turns to the second qualified immunity prong because failure to establish either prong is dispositive. *See Jones v. Wilhelm,* 425 F.3d at 460. Under the second inquiry, Plaintiffs bear the burden of establishing that their First Amendment rights were "clearly established." *Wernsing,* 423 F.3d at 742. To do so, Plaintiffs "must demonstrate either that a court has upheld the purported right in a case factually similar to the one under review, or that the alleged misconduct constituted an obvious violation of a constitutional right." *Id.*

Plaintiffs heavily rely on *Tinker* to demonstrate the second qualified immunity prong. In *Tinker,* two high school students and one junior high student wore black armbands to school "to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and by their example, to influence others to adopt them." *Id.* at 514. The school administration subsequently prohibited the armbands and suspended the students in violation of a school policy after which the students brought a First Amendment action in federal court. *Id.* at 504-05. Because the students' conduct was not disruptive, more specifically, because there was nothing in the record that established that the wearing of the armbands "would substantially interfere with the work of the school or impinge upon the rights of other students" the Supreme Court concluded that the school could not prohibit the students from wearing the armbands. *Id.* at 509, 514.

Although Plaintiffs contend the facts in *Tinker* are sufficiently similar to the case at hand, Plaintiffs' reliance on *Tinker* as clearly established law is not dispositive of the Court's inquiry because the Supreme Court has modified the *Tinker* holding. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 567, 98 L.Ed.2d 592 (1988); *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986). The Seventh Circuit has articulated that since the *Tinker* decision, "the Supreme Court has cast some doubt on the extent to which students retain free speech rights in the school setting." *Baxter v. Vigo County Sch. Corp.,* 26 F.3d 728, 736 (7th Cir. 1994). Another Seventh Circuit panel recognized that "Supreme Court decisions since *Tinker* indicate that the teaching of civility and the inculcation of traditional moral, social, and political norms may override student expression, or at least that it is permissible for a school board to so order its educational priorities." *See Muller v. Jefferson Lighthouse Sch.,* 98 F.3d 1530, 1539 (7th Cir. 1996). Because the Supreme Court has modified the *Tinker* holding, *Tinker* alone is not dispositive of the Court's "clearly established" inquiry as Plaintiffs suggest.

Thus, the Court must determine whether the alleged misconduct constituted an obvious violation of a constitutional right. *See Jones v. Wilhelm,* 425 F.3d at 460. The Court's "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted." *See Saucier,* 533 U.S. at 202 (inquiry "undertaken in light of the specific context of the case, not as a broad general proposition"); *see also Hosty v. Carter,* 412 F.3d 731, 738 (7th Cir. 2005) (en banc). In other words, the Court looks to whether a reasonable public official in the individual Defendants' positions would have understood

that his or her actions were unlawful in the factual situation at hand. *See Anderson v. Creighton,* 483 U.S. 635, 640-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (law at time of conduct must have been "clear in relation to the specific facts confronting the public official when he acted"); *see also Wernsing,* 423 F.3d 742 ("contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). Although this is an objective test, subjective factors are not ignored, such as the information Defendants possessed at the time they prohibited the alternative T-shirt. *See Hammond v. Kunard,* 148 F.3d 692, 696-97 (7th Cir. 1998) (citing *Anderson v. Creighton,* 483 U.S. at 641).

Here, there is evidence in the record that there were tensions between the regular students and the gifted students and that Defendants had safety concerns as a result of these tensions. (*See* Defs.' Stmt. P 114, Ex B., Rosales Dep. at 46.) To remedy the situation, Kotis and Rosales attempted to address the T-shirt controversy by meeting with the gifted students and their parents, suggesting that the students talk to the Local School Board, giving the students options of when and how they could wear the T-shirts, and consulting a Crisis Intervention Team. (Defs.' Stmt. PP 70, 125, 127.) Although Principal Kotis prohibited the wearing of the T-shirt and restricted the gifted students to their home room if the students wore the T-shirt to school, once the Crisis Intervention Team concluded there were no safety concerns, Principal Kotis allowed the students to wear the T-shirts again. (R. 167-1, Pls.' Appendix, Ex. D, Crisis Team Report, at 1; Defs.' Stmt. P 133.)

Under these circumstances, the contours of the gifted students' First Amendment rights would not be sufficiently clear to a reasonable official that what he or she was doing

violated those rights, especially because Defendants' restrictions concerning the T-shirts took place in the nonpublic setting of a school. *See Muller,* 98 F.3d at 1537 ("Speech in nonpublic forums is subject to significantly greater regulation than speech in traditional public forums"). Moreover, case law regarding student speech under the First Amendment is nuanced, and thus the law is not as clear cut as Plaintiffs argue. As the Seventh Circuit recognized "many aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply." *See Hosty,* 412 F.3d at 739. The *Hosty* Court further reasoned that "public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved." *Id.*

These "constitutional uncertainties" in student speech are illustrated by Plaintiffs' confusion over the concept of imprimatur. In *Kuhlmeier,* the Supreme Court held that if parents, students, and members of the public reasonably ***perceive*** a student's expressive conduct to bear the imprimatur of the school, the school could censor the student's conduct as long as the school's actions were reasonably related to legitimate pedagogical concerns. *See Kuhlmeier,* 484 U.S. at 271-73. Plaintiffs argue that *Kuhlmeier* is not controlling because the school did not sponsor the "gifties" T-shirt. The relevant inquiry, however, is whether the public, parents, and other students would perceive that the T-shirt reflected the school's imprimatur, that is, that it appeared that the school approved the T-shirt design. Here, it is undisputed that the design of the "gifties" T-shirt included the words "Beaubien Class of 2003" and "Beaubien Bulldog," and thus the public, students, and parents might reasonably perceive that the "gifties" T-shirt was actually approved by the Beaubien administration. Consequently, the Beaubien administration was entitled to exercise greater control over this particular type of student speech. *See id.* at 271.

Accordingly, under the legal uncertainties concerning First Amendment rights to free speech in the school setting, the school administration's prohibition of the gifted students' T-shirt was not an obvious violation of the students' First Amendment rights. *See Jones v. Wilhelm,* 425 F.3d at 460. In sum, a reasonable official in the individual Defendants' position could not have known ***definitively*** whether the prohibition of the T-shirts violated the gifted students' First Amendment rights. *See Wernsing,* 423 F.3d at 750. As such, Plaintiffs have not met their burden in establishing that their constitutional rights under the particular circumstances of this case were "clearly established" at the time of the alleged constitutional violation. *See Anderson v. Creighton,* 483 U.S. at 640-41. Thus, the doctrine of qualified immunity shields Kotis, Clancy, Rosales, and Laughlin from Plaintiffs' First Amendment claims. The Court's conclusion is further supported by the decision in *Wood v. Strickland,* 420 U.S. 308, 319-20, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), in which the Supreme Court articulated that:

> Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.... Denying any measure of immunity in these circumstances would contribute not to principled and fearless decision-making but to intimidation. The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best

> serving the long-term interest of the school and the students.

Id. at 319-20 (internal citation and quotation omitted). The Court thus dismisses Plaintiffs' claims against Kotis, Clancy, Rosales, and Laughlin[4] in their individual capacities.

III. Monell Claim

Plaintiffs' First Amendment claim against Kotis, Rosales, Laughlin, and Clancy in their official capacities is a claim against the Board of Education as a local governmental unit. *See Kentucky v. Graham,* 473 U.S. 159, 165-66, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114, 121 (1985) (citing *Monell v. Dep't. of Soc. Servs. of New York,* 436 U.S. 658, 690, n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). In other words, official capacity suits brought against individuals are "another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham,* 473 U.S. at 165 (citation omitted). Because Plaintiffs' claims against the individual

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[4] For an individual to be liable under Section 1983, she must have caused or participated in the alleged constitutional violation. *Pepper v. Village of Oak Park,* 430 F.3d 805, 810 (7th Cir. 2005). Thus, Plaintiffs must establish that the individual Defendants "acquiesced in some demonstrable way in the alleged constitutional violation." *Palmer v. Marion County,* 327 F.3d 588, 594 (7th Cir. 2003); *see also Hosty v. Carter,* 412 F.3d 731, 731 (7th Cir. 2005) (en banc) (Section 1983 does not create vicarious liability). The record does not support the proposition that Defendant Laughlin caused or participated in the prohibition of the "gifties" T-shirt. Thus, the Court also dismisses Laughlin on the ground that she was not personally involved in the alleged deprivation of Plaintiffs' First Amendment rights.

Defendants in their official capacities are claims against the Board and thus duplicative, the Court dismisses the individual Defendants in their official capacities from this lawsuit.

To state a constitutional claim against the Board, Plaintiffs must establish that an official custom or policy caused a deprivation of their First Amendment right to free speech. *See Monell,* 436 U.S. at 690-91; *Sornberger v. City of Knoxville, Illinois,* 434 F.3d at 1006, 1029 (7th Cir. 2006) (under Section 1983 government agency cannot be liable on theory of respondeat superior). To demonstrate that an official custom or policy caused the alleged violation of their First Amendment rights, Plaintiffs must establish one of the following scenarios: (1) the Board has an express policy that, when enforced, causes a constitutional deprivation; (2) the Board has a widespread practice that, although not authorized by written law or express policy, is so permanent and well-settled that it constitutes custom or usage within the force of law; or (3) a person with final policymaking authority caused the constitutional injury. *Calhoun v. Ramsey,* 408 F.3d 375, 379 (7th Cir. 2005).

A. Final Policymaking Authority

Plaintiffs argue that Principal Kotis was an individual with final policymaking authority in the area of school conduct and discipline, and therefore the Board is liable for Kotis' conduct under the third *Monell* scenario. Under Section 1983, an individual's status as a final policymaker is a question of state or local law. *Killinger v. Johnson,* 389 F.3d 765, 771 (7th Cir. 2004); *see also Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). To identify public officials with final policymaking authority, the Court reviews state and local law, as well as custom or usage

having the force of law. *Killinger,* 389 F.3d at 772 (citation and quotations omitted).

Plaintiffs specifically contend that Principal Kotis is an individual with final "decision making" authority in the area of school conduct and discipline based on UDC Rule 2-5. (R. 165-1, Pls.' Mem. In Opp. to Board's M. Summ. J., at 4.). Plaintiffs, however, confuse "decision maker" with "final policymaker." Not every decision a public official makes involves policymaking as required under the *Monell* framework. *See Pembaur,* 475 U.S. at 482. "The fact that a particular official -- even a policymaking official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Id.* Instead, the public officer "must be responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Id.* at 482-83.

Pursuant to the Board of Education Rules:

> Principals of schools are the responsible administrative heads of their respective schools and are charged with the organization, supervision, administration, and discipline thereof. They shall establish and enforce such regulations, not contrary to the Rules of the Board of Education, the Uniform Discipline Code, or the regulations of the General Superintendent of Schools, as in their judgment may be necessary for the successful conduct of their schools.

(Defs.'s Stmt. P 9, Ex. E, Bd. of Educ. Rules, Section 6-12.) From the unequivocal language of Section 6-12 of the Board's Rules, principals in the Chicago Public Schools have the

discretionary authority to make decisions contingent upon the Board Rules, the UDC, and the regulations of the General Superintendent of Schools. The Board's Rules, however, do not confer the authority for principals to make city-wide policy decisions. *See Killinger,* 389 F.3d at 771 ("mere authority to implement pre-existing rules is not the authority to set policy"). That authority is left to the School Board. *See* 105 ILCS 5/10-20.5; *see also Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84,* 133 F.3d 1054, 1059-60 (7th Cir. 1998) (Board of Education has authority to manage schools and adopt rules and regulations needed for that purpose); *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.,* 118 Ill.2d 389, 404, 113 Ill.Dec. 915, 515 N.E.2d 1222 (1987) (same). Consequently, Principals Kotis is not a "final policymaker" as Plaintiffs claim.

Nonetheless, Plaintiffs contend that because UDC Rule 2-5 is unconstitutionally overbroad it provides the basis for Principal Kotis' policymaking authority. Specifically, Plaintiffs argue that the disciplinary rule is "effectively and actually a delegation by the Board of Education of unconstitutional power and authority to any and all Chicago Public School principals and administrators." (R. 165-1, Pls.' Mem. In Opposition to Board's M. Summ. J., at 4.)[5] In

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[5] Plaintiffs also argue that the disciplinary and dress codes constituted an unconstitutional prior restraint of the students' free speech. Not only is Plaintiffs' argument cursory and undeveloped, Plaintiffs' contention that Defendants' conduct constituted viewpoint discrimination is simply not supported by the record. *See Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 813, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (prior restraints in nonpublic forums permissible when reasonable and viewpoint neutral); *Anderson v. Milwaukee County,* 433 F.3d 975, 979 (7th Cir. 2006)

general, a plaintiff may challenge rules, regulations, or laws as facially unconstitutional under two theories -- the overbreadth doctrine and the void for vagueness doctrine. *See Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001). "The overbreadth doctrine allows a plaintiff to ask that a law be struck down based not on how it affects the plaintiff but on how it might be applied to third parties not before the court." *Anderson v. Milwaukee County*, 433 F.3d 975, 979 (7th Cir. 2006); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) ("statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society -- to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Secretary of State of Maryland. v. Munson*, 467 U.S. 947, 958, 104 S.Ct. 2839, 2847, 81 L.Ed.2d 786 (1984). Because of the overbreadth doctrine's far-reaching effects, courts must apply it "with hesitation" and "only as a last resort." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999) (citation omitted).

Under the Uniform Discipline Code, there are six groups of misconduct, including: (1) misconduct that includes inappropriate student behaviors, such as running in the hall; (2) misconduct that disrupts the orderly educational process in school, including leaving the school without permission; (3) conduct that seriously disrupts the educational process, such as gambling; (4) conduct that includes assault, extortion,

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(same); *see, e.g., Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996).

vandalism, and other offenses; (5) conduct such as burglary and gang activity; and (6) conduct such as arson, murder, and kidnaping. (Defs.' Stmt. P 11, Ex. F, Uniform Discipline Code at 19-25) At issue is Group 2 misconduct, namely, conduct that disrupts the school's educational process. Under Group 2, the disciplinary code lists ten behaviors that constitute such disruptive conduct, including defying the authority of school personnel and failing to abide by school rules and regulations. (*Id.;* Pls.' Stmt. Add'l Facts P 37.) Here, the gifted students failed to abide by the Beaubien School Dress Code No.2, which states in relevant part: "Clothing with inappropriate words or slogans is not permitted." (Pls.' Stmt. P 9.)

Plaintiffs argue that UDC Rule 2-5 is overbroad because it is a rule which states that students cannot violate a rule and is therefore redundant. The Court disagrees. As the Seventh Circuit recently instructed "common sense must not be and should not be suspended when judging the constitutionality of a rule or statute." *See Anderson v. Milwaukee County,* 433 F.3d at 978. Under the common sense interpretation of the disciplinary code, it is evident that Section 2-5 is specifically directed at student conduct that disrupts the school's educational process. "Failing to abide by school rules and regulations" means that if you fail to follow the school rules, such as the school dress code, your conduct is considered disruptive. There is nothing redundant about the code and its directive is sufficiently narrow and reasonable because it applies to the school rules and regulations and is limited by reference to those rules. *See id.* at 979. The *Tinker* decision and its progeny further support this conclusion because speech in nonpublic forums, such elementary schools, is subject to significantly greater regulation than speech in traditional public forums. *See Muller,* 98 F.3d at 1537. Thus,

restrictions of speech in nonpublic forums need only be reasonable. *Anderson v. Milwaukee County,* 433 F.3d at 980.

Next, Plaintiffs contend that UDC Rule 2-5 and the dress code are void for vagueness. Specifically, Plaintiffs argue that "with no way of identifying the source of content of the underlying rules, a student might not even know about the rules until they were violated. A rule must provide at least minimal notice so that a student may conform his or her actions to the rule." (R. 133-1, Mem. In Support of M. Part. Summ. J., at 11.) Plaintiffs also argue that the rule is circuitous and confusing.

"A law is void for vagueness if it fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior." *Anderson v. Milwaukee County,* 433 F.3d at 978 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). For a plaintiff to succeed on a vagueness claim, she must demonstrate that the rule is impermissibly vague in all of its applications. *Fuller,* 251 F.3d at 667 (citation and quotation omitted). In the context of school disciplinary codes, the Supreme Court gives the following guidance: "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Fraser,* 478 U.S. at 686.

Although Plaintiffs unequivocally argue that they are facially attacking the disciplinary rule and dress code, they do not attempt to show that the that the rules are unconstitutional in all of their applications as opposed to "as applied" to the

students themselves. *See Fuller,* 251 F.3d at 667-68; *see also United States v. Rodgers,* 755 F.2d 533, 544 (7th Cir. 1985) ("party seeking to overturn a statute for vagueness on its face must in essence establish that it is unconstitutionally vague in at least a substantial number of the cases to which it could apply"). Consequently, Plaintiffs' attempt to facially attack the disciplinary rule and dress code as unconstitutionally vague simply fails because they do not address the code's overall applications. *See Fuller,* 251 F.3d at 667-68.

In short, UDC Rule 2-5 in conjunction with the dress code is not overbroad or vague and does not confer any policy making authority to Principal Kotis as Plaintiffs contend. Thus, Plaintiffs' argument based on the third *Monell* scenario fails because Principal Kotis did not have final policymaking authority under the circumstances.[6]

B. Express Policy

Plaintiffs also argue that UDC Rule 2-5 and the school dress code embody an express policy that caused and directly contributed to the students alleged constitutional deprivation.

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[6] Plaintiffs' arguments that the Board's delegation of authority to the Department of Law and that certain Board members' inaction establishes municipal liability are not only undeveloped, but Plaintiffs fail to cite any legal authority to support these claims. Thus, Plaintiffs have waived these arguments. *See Estate of Moreland v. Dieter,* 395 F.3d 747, 759 (7th Cir. 2005) ("Perfunctory or undeveloped arguments are waived"). In fact, these claims do not fall under the *Monell* rubric, but instead appear to be loosely based on the doctrine of respondeat superior which cannot apply to governmental units such as the Board of Education. *See Sornberger v. City of Knoxville, Illinois,* 434 F.3d at 1006, 1029 (7th Cir. 2006).

This argument relies on the first *Monell* scenario, namely, that the Board has an express policy, that when enforced, deprived the gifted students of their First Amendment right to free speech.

"The express policy theory applies, as the name suggests, where a policy explicitly violates a constitutional right when enforced." *Calhoun*, 408 F.3d at 379 (policy must violate constitutional right "on its face"). Because the Plaintiffs' claim partially rests on the Beaubien School dress code, Plaintiffs have not established that there is a Board of Education policy at issue. *See id.* at 380. In other words, the Beaubien School dress code cannot form the basis of liability under *Monell* because it is not a Board policy or custom in the first instance. *See Chortek v. City of Milwaukee*, 356 F.3d 740, 748-49 (7th Cir. 2004) ("Only those individuals with the requisite policymaking authority are capable of establishing 'official policy' as required by *Monell*"). As discussed, because Principal Kotis does not have the requisite policy making authority under the circumstances, Plaintiffs' claim based on the disciplinary code in conjunction with the school dress code must fail. *See id.* at 749. The Court thereby dismisses Plaintiffs' claims against the Board.

CONCLUSION

For these reasons, the Court denies Plaintiffs' Partial Motion for Summary Judgment. The Court grants Defendant School Board's Motion for Summary Judgment, Defendants Laughlin's and Clancy's Motion for Summary Judgment, Defendant Kotis' Motion for Summary Judgment, and Defendant Rosales' Motion for Summary Judgment. Finally, the Court denies Defendants' Motion to Strike as moot.

Dated: March 13, 2006

AMY J. ST EVE

United States District Court Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' motion for summary judgment [131] is denied. Defendants' motions for summary judgment [135, 138, and 139] are granted. All other pending motions are denied as moot. Memorandum Opinion and Order is entered.

Date: 3/13/2006